STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

THE PEOPLE OF THE STATE OF ILLINOIS, *ex. rel.* LISA MADIGAN, Attorney General of the State of Illinois	)	
Complaint to suspend tariff changes submitted by Ameren Illinois and to investigate Ameren Illinois Rate MAPP pursuant to Sections 9-201, 9-250 and 16-108.5 of the Public Utilities Act	)	Docket No. 13-0501
	)	(cons.)
AMEREN ILLINOIS COMPANY d/b/a Ameren Illinois Revisions to its Formula Rate Structure and Protocols	)	Docket No. 13-0517

THE PEOPLE OF THE STATE OF ILLINOIS'
APPLICATION FOR REHEARING

The People of the State of Illinois, by and through Lisa Madigan, Attorney General of the State of Illinois ("the People" or "AG"), pursuant to Part 200.880 of the Commission's Rules of Practice, 83 Ill.Admin.Code Part 200.880, hereby file their Application for Rehearing in the above-captioned proceeding concerning the formula rates applicable to Ameren Illinois Company ("Ameren", "AIC", or "the Company").

I. Introduction

On November 26, 2013, the Commission entered its Interim Order in this proceeding. In that Order, the Commission rejected recommendations of the People and the Citizens Utility Board ("CUB") regarding two important components of the reconciliation calculation – a calculation that if not corrected now, will unfairly impact rates going forward at least through the year 2022, when the formula rate regulatory structure is set to expire pursuant to Section 16-108.5(h) of the Energy Infrastructure Modernization Act.

First, the People request that the Commission reconsider its rejection of the AG-proposed adjustment which would apply interest to the "net-of-tax" reconciliation balance. Reconsideration is particularly relevant in light of a recently issued Fourth District Appellate Court ruling in *Ameren Illinois Company v. Illinois Commerce Comm'n,* Slip Op. 4-12-1008, 4-13-0029 (cons.), dated December 11, 2013 and modified upon denial of rehearing January 28, 2014 (the "Fourth District Opinion"). That opinion presents new controlling law that specifically authorizes the Commission to interpret the relevant portions of the Public Utilities Act ("PUA" or the "Act") – including the recent modifications to Section 16-108.5 effected by Public Act 98-0015 dated May 22, 2013 ("PA 98-0015") – to deduct deferred tax from the reconciliation balance prior to calculating interest on that balance, consistent with established regulatory principles. As the controlling law of the Fourth District Opinion was not available when the Commission entered its Interim Order in this docket on November 26, 2013, the Commission should now revisit the issue and adopt the People's proposed modification to the Company's formula rate template contained at Exhibit 2 to the People's Initial Brief.

Second, the Commission's November 26, 2013 Interim Order brings an inaccurate interpretation of statutory construction canons to the issue of how the return on equity ("ROE") "collar" adjustment specified in Section 16-108.5(c)(5) of the Act should be calculated, and imposes the use of end-of-year rate base in making the ROE calculation despite the fact that the recent amendments to the Act that took effect in May of 2013 imposed no such requirement. The General Assembly's silence on the issue, while taking great pains to insert language that authorized the incorporation of year-end rate base for other components of the formula rate calculation process, point to the need and appropriateness of maintaining the Commission's previous authorization of average rate base on this aspect of the formula rate calculation. The

People seek rehearing on this issue as well; the Commission should adopt the People's proposed modification to the Company's formula rate template contained at Exhibit 1 to the People's Initial Brief.

These arguments are discussed further below. In addition to the issues discussed in parts II and III below, in light of the Commission's conclusion at page 36 of its Final Order on bifurcated issues, dated August 19, 2014, that changes to the formula rate calculation that do not affect Schedules FR A-1 or FR A-1 REC can be made in the annual formula rate update proceedings without a Section 9-201 filing, the People request that the Commission rehear this matter to state that it can consider both of the People's proposals described above (the application of interest to the net-of-tax reconciliation balance and the use of average rate base in the calculation of the ROE collar) in the annual formula rate update cases.

II. The Fourth District's Opinion on Deferred Income Tax Requires the Commission To Revisit and Modify its Interim Order on the Issue of Reflecting Net-of-Tax Reconciliation Balances For Purposes of Calculating Interest Thereon.

A. The December 11, 2013 Fourth District Opinion

The recent Fourth District Opinion, which was issued approximately two weeks after the Commission entered its Interim Order in this proceeding, stemmed from a consolidated appeal of the Commission's final orders in Ameren's first two electric formula rate cases, Docket Nos. 12-0001 and 12-0293.[1] In that consolidated appeal, AIC challenged, among other issues, the Commission's decision in the two cases to deduct deferred income tax from its filing-year projected plant additions for purposes of calculating rate base. See Docket No. 12-0001, Order

[1] A copy of the Fourth District Opinion, as modified upon denial of rehearing on January 28, 2014, is attached to this Application for Rehearing as Appendix A.

of September 19, 2012 at 52-53; Docket No. 12-0293, Order of December 5, 2012 at 29-30. In doing so, the Company argued – just as Ameren and the Commission Staff argued in this case relative to the reconciliation balance – that Section 16-108.5 did not specifically authorize the Commission to deduct accumulated deferred income taxes from AIC's projected plant balances.

The Fourth District court specifically rejected that argument. As the Fourth District Opinion noted, "[w]hile the Commission agrees the [PUA] does not expressly allow an adjustment for [deferred income tax], the Commission explains the statute does not expressly disallow the adjustment, but authorizes the Commission to exercise its discretion in determining just and reasonable rates."[2] *See* Docket No. 12-0293, Order of December 5, 2012 at 29. Moreover, the Court emphasized that a failure to deduct ADIT from the plant balances at issue would ensure that the Company would gain a significant windfall at the expense of ratepayers. The Court held that deducting deferred income tax from projected plant additions is correct as a matter of prudent accounting: "[o]mitting [deferred income tax] from the rate base calculation would allow Ameren what amounts to an interest-free loan at the ratepayers' expense that would artificially increase Ameren's rates until the next reconciliation process, a result which is neither just nor reasonable for ratepayers."[3] Thus, the Fourth District Opinion held that "[a]s it was consistent with the common practice of the Commission to include [deferred income tax] in the ratemaking process, the Commission did not err by including the [deferred income tax] adjustment for projected plan[t] additions in its ratemaking calculation." [4] By upholding the lawfulness of the Commission's decision in ¶ 40 of the opinion, the Fourth District Appellate Court thus endorsed the characterization in ¶ 38 of the opinion of the Commission's "discretion"

[2] Fourth District Opinion at ¶ 38.
[3] Fourth District Opinion at ¶ 39.
[4] Fourth District Opinion at ¶ 40.

and "authoriz[ation]" to set just and reasonable rates without express statutory allowance of a particular ratemaking treatment.

It is important to note that nothing in Article XVI or Article IX of the PUA expressly authorizes the Commission to deduct deferred income tax from projected plant additions or plant in general for purposes of calculating rate base. Nonetheless, despite the lack of such express statutory authorization, the Appellate Court held in the Fourth District Opinion that the Commission has "discretion" to make such deduction.

B. Implication of the Fourth District Opinion For This Proceeding

Addressing a slightly different aspect of the annual electric formula ratemaking process, Section 16-108.5(d)(1) of the PUA states that "[a]ny over-collection or under-collection indicated by [the annual] reconciliation shall be reflected as a credit against, or recovered as an additional charge to, respectively, with interest calculated at a rate equal to the utility's weighted average cost of capital approved by the Commission for the prior rate year, the charges for the applicable rate year." Section 16-108.5(d)(1) says nothing about deducting deferred income tax from the reconciliation over-collection or under-collection for purposes of calculating interest thereon. Although the Commission specifically recognized in its November 26, 2013 Interim Order that it "finds merit in the AG's position, supported by CUB. This approach conforms to GAAP, would capture deferred tax benefits, and is likely a more accurate accounting for all of the economic impacts caused by revenue requirement reconciliation," the Commission rejected the proposed ADIT adjustment based on the Act's failure to specifically require the deduction. The Commission noted in its November 26, 2013 Interim Order that "it is difficult for the Commission to support an interpretation of the Act which reads into it exceptions, limitations, or

conditions the legislature did not express. *Davis v. Toshiba Machine Co*., 186 Ill.2d 181, 184-185 (1999)." Interim Order at 26.

As the Fourth District Opinion stated at ¶ 38, however, the absence of express statutory authorization to deduct deferred income tax from a ratemaking amount in an electric formula rate case does not rob the Commission of its inherent discretion and authorization to make such adjustment if necessary to establish just and reasonable rates. Further, as the Illinois Supreme Court has stated:

> it is not sufficient to read a portion of the statute in isolation. We must, instead, read the statute in its entirety, keeping in mind the subject it addresses and the legislature's apparent objective in enacting it. *Gill v. Miller,* 94 Ill.2d 52, 56, 67 Ill.Dec. 850, 445 N.E.2d 330 (1983). Where the language of the statute is clear and unambiguous, we must apply it as written, without resort to other tools of statutory construction. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill.2d 248, 255, 282 Ill.Dec. 815, 807 N.E.2d 439 (2004). Generally, the language of a statute is considered ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses. *In re B.C.,* 176 Ill.2d 536, 543, 223 Ill.Dec. 919, 680 N.E.2d 1355 (1997).

Mid Electrical Contractors, Inc. v. Abrams, 228 Ill.2d 281, 287-288 (2008). The overall purpose of Section 16-108.5 is to reconcile the utility's revenue requirement every year so that the utility recovers revenues sufficient to cover its actual costs during each annual formula rate cycle. Allowing interest on cash that is *not* foregone does not meet the statutory goal of matching the reconciliation to actual costs and applying interest to the actual cash "under- or over-collection."

The Commission has made clear it finds "merit," as a matter of prudent accounting, in the People's proposal to deduct deferred income tax from the reconciliation balance for purposes of calculating interest thereon. Interim Order at 26. The new guidance provided by the Fourth District Opinion provides the Commission with assurance that it has the discretion and

authorization to implement this adjustment, despite the lack of express statutory authorization in Section 16-108.5(d)(1) of the PUA.

The People filed a Verified Motion to Revisit the ADIT Adjustment to Interest on the Reconciliation Balance and the Return on Equity Collar Calculation in this proceeding on December 27, 2013, arguing at pages 6-7 that the Fourth District Opinion's holding established that "the absence of express statutory authorization to deduct deferred income tax from a ratemaking amount in an electric formula rate case does not rob the Commission of its inherent discretion and authorization to make such adjustment if necessary to establish just and reasonable rates."[5] The Commission denied this Verified Motion to Revisit on February 5, 2014, following a Memorandum from the ALJs suggesting that the Commission should deny the motion "to remain consistent with the Commission's recent action in Docket No. 13-0553," which involved the same issues for Commonwealth Edison Company. In light of the pending appeal of the Commission's decision on the similar issue in Docket No. 13-0553 (IL App. Case No. 1-14-0114 (cons.)) the Commission should consider the holding of the Fourth District Motion on the merits rather than in light of an order from a different utility's case that is now on appeal.

In its Interim Order at 26, the Commission stated: "[i]n the future, if further arguments by parties are presented or clarity from the legislature is provided on this topic, the Commission will revisit the issue." The People thus request that the Commission revisit this issue in light of the clear precedent and analysis found in the Fourth District Opinion and the arguments set forth

[5] The argument made by the People in their Verified Motion to Revisit is still valid even after the Fourth District Opinion was modified upon denial of rehearing on January 28, 2014 to remove one sentence from ¶ 39, which sentence the People have not relied upon in this Application for Rehearing. *See also* the People's Response to AIC Verified Notice of Supplemental Authority, filed February 4, 2014, available at http://www.icc.illinois.gov/downloads/public/edocket/368444.pdf.

herein, as well as the arguments presented in the People's Initial Brief, Reply Brief and Brief on Exceptions. Failure to adopt the OAG-proposed deduction of ADIT on the reconciliation over-collection would be contrary to law, not supported by substantial evidence, arbitrary and capricious, and contrary to Section 10-201(e)(iv)(A-D) of the Act. In support of this request for rehearing, the People incorporate by reference the arguments they presented at pages 17-24 of the AG Corrected Initial Brief; pages 12-22 of the AG Reply Brief; and pages 11-23 of the AG Brief on Exceptions. Accordingly, the People request that the Commission grant rehearing on this matter.

III. The Commission Should Reconsider Its Rejection Of The Use of An Average Rate Base in the Return on Equity Collar Calculation.

The Commission's November 26, 2013 Interim Order adopts the Company's and Staff's position to include a year-end rate base in the return on equity ("ROE") collar calculation for annual formula rate updates under Section 16-108.5(c)(5) of the Act. In its rejection of the People's proposal to reflect Ameren's average rate base in the ROE collar calculation, the Commission noted that it believes that "use of the average rate base will produce a dollar balance that correctly represents the actual capital supplied by equity investors to support AIC's rate base over the course of the year for which the ROE is being calculated." Interim Order at 12. However, the Commission concluded that the General Assembly, when it amended the Act through P.A. 98-0015, intended to use year-end rate base, rather than an average rate base, in the ROE collar calculation. *Id.* This conclusion, however, is based solely on an inference of the General Assembly's legislative intent that is inconsistent with basic canons of statutory interpretation, and should be rejected by the Commission. As discussed below, the plain language and structure of Section 16-108.5 of the Act, the amendments to that section found in

P.A. 98-0015, and the Commission's prior decision in Docket No. 12-0001, Ameren's first formula rate reconciliation proceeding, demonstrate that the General Assembly, in fact, neither changed the Commission's treatment of the ROE collar rate base in Docket No. 12-0001 nor indicated an intent that year-end rate base be used in the ROE collar calculation.

The Act is silent on the rate base to use in the collar calculation and, contrary to the conclusion of the Interim Order, the Act's silence does not justify the use of year-end rate base for that purpose. Section 16-108.5(c)(5) of the PUA, prior to the passage of P.A. 98-0015, described the ROE collar and directed the Commission to calculate the ROE "using costs and capital structure approved by the Commission as provided in" Section 16-108.5(c)(2). *This section was not amended by P.A. 98-0015.* However, its referent, Section 16-108.5(c)(2), *was* amended by P.A. 98-0015, now providing that the formula rate shall "[r]eflect the utility's actual year-end capital structure for the applicable calendar year." 220 ILCS 5/16-108.5(c)(5). But "capital structure" and "rate base" are not interchangeable terms. Rather, they are independent terms that reflect different calculations.

If the new "year-end capital structure" language found in Section 16-108.5(c)(2), as amended by P.A. 98-0015, is interpreted by itself to require the use of year-end *rate base* in the ROE collar calculation, then that same language alone should, logically, also require the use of year-end rate base in the reconciliation year revenue requirement calculation. However, the General Assembly, in P.A. 98-0015, purposely inserted amendatory language into Section 16-108.5(d)(1) expressly providing that year-end rate base should be used in computing the reconciliation year revenue requirement. If the amendatory "year-end capital structure" language in Section 16-108.5(c)(2) alone mandates the use of year-end rate base in key formula rate calculations (reconciliation year revenue requirement and ROE collar), then that renders the new

"year-end rate base" language in Section 16-108.5(d)(1) as amended by P.A. 98-0015 unnecessary and superfluous.[6] The Commission's logic on this point in the Interim Order is, thus, flawed.

While the General Assembly did not change the ROE collar section of the law (Section 16-108.5(c)(5)) or in any way adopt a requirement to use year-end *rate base* in the ROE collar calculation, a statutory directive addressing how rate base should be calculated for the reconciliation year revenue requirement *was* adopted by the General Assembly. An elementary canon of statutory construction is to avoid interpretations that render any language in the statute superfluous. "A court presumes that the legislature intended that two or more statutes which relate to the same subject are to be read harmoniously so that no provisions are rendered inoperative." *Knolls Condominium Ass'n v. Harms*, 202 Ill.2d 450, 458-9 (2002). The General Assembly clearly added the amendatory "year-end rate base" language to Section 16-108.5(d)(1) because it wanted to alter the rate base used in the reconciliation year revenue requirement calculation, recognizing that the amendatory "year-end capital structure" in Section 16-108.5(c)(2) did *not* mandate the use of year-end rate base in the reconciliation year revenue requirement calculation. It follows that the "year-end capital structure" amendatory language also did not alter the rate base to be used in the ROE collar calculation. As discussed above, capital structure and rate base are two different concepts and the ROE collar calculation measures profitability – not the reconciliation year revenue requirement.

[6] Similarly, it is significant to note that Section 16-108.5(c)(5) cross-references Section 16-108.5(c)(2) with regard to the *capital structure* to be used in the ROE collar calculation. However, Section 16-108.5(c)(5) contains no cross-reference to Section 16-108.5(d)(1) with regard to the *rate base* to be used in the ROE collar calculation. P.A. 98-0015 did not address how rate base should be calculated for purposes of the ROE collar. Contrary to the Commission's conclusion, the General Assembly has not indicated any intention to change the average rate base used in the ROE collar calculation.

The Appellate Court has also had the opportunity to affirm the Commission's adjustment of Ameren's capital structure in Dockets 12-0001 and 12-0293, Ameren's first formula rate orders. 2013 IL App 4th 121008, ¶ 29. The Act's treatment of capital structure is distinct from its treatment of rate base in the calculation of the ROE collar.

Prior to the passage of the amendatory P.A. 98-0015, the Commission had, in prior formula rate orders, concluded that using an average rate base in formula rate calculations for the reconciliation year accurately reflected the utility's actual cost of investment over the course of the year. *See* Docket No. 11-0721, Order at 18-21 (May 29, 2012) (Commonwealth Edison); Docket No. 12-0001, Order at 174-175 (Sep. 19, 2012) (Ameren).[7] P.A. 98-0015 does not address the Commission's prior adoption of average rate base and did not amend Section 16-108.5(c)(2) to require the use of year-end rate base in the ROE collar calculation. Moreover, neither of the utilities eligible to participate in formula rates challenged the use of average rate base in the ROE collar calculation in prior Commission formula rate dockets in their Applications for Rehearing or on appeal – despite their advocacy for end-of-year rate base in the formula rate reconciliation calculations.

The Commission has, in the past, distinguished between the two issues of (i) average vs. year-end capital structure, and (ii) average vs. year-end rate base. *See*, *e.g.*, Docket No. 12-0001, Order at 106 (Sep. 19, 2012) (addressing a methodology for determining the Company's capital structure for purposes of the ROE collar calculation, with "capital structure" shown as the percentage mix of common equity, preferred stock, long-term debt, and short term debt). This previously accepted method continues to be presented by the People. As AG witness Effron

[7] The Commission's decision as to the use of average rate base in Docket No. 12-0001 was repeated in its Order in Ameren's next electric delivery service formula rate update proceeding, Docket No. 12-0293, dated December 5, 2012, at page 111.

stated in direct testimony, "the continuing use of the average rate base in the ROE collar calculation is necessary to accurately measure the ROE earned based on the actual equity investment over the course of the year." AG Ex. 2.0 at 4:220-222.

In addition, the Fourth District Opinion expressly found that the failure of the Public Utilities Act to expressly reference a particular ratemaking adjustment did not foreclose the Commission from making a particular accounting adjustment pursuant to its ratemaking authority, as noted in Part II above. The Commission stated in its Interim Order of November 26, 2013 at 12 that "use of the average rate base most accurately reflects AIC's costs." In light of the accuracy of the proposed treatment recommended by the People, as the Fourth District Opinion stated at ¶ 38, the absence of express statutory authorization for a ratemaking adjustment in an electric formula rate case does not rob the Commission of its inherent discretion and authorization to make such adjustment to establish just and reasonable rates. [8]

Failure to adopt the use of average rate base in the ROE collar calculation results, in this case, in excessive rates and would be contrary to law, not supported by substantial evidence, arbitrary and capricious, and contrary to Section 10-201(e)(iv)(A-D) of the Act. In support of this request for rehearing, the People incorporate by reference the arguments it presented at pages 9-17 of the AG Corrected Initial Brief; pages 4-12 of the AG Reply Brief; and pages 3-11 of the AG Brief on Exceptions. Accordingly, the People request that the Commission grant rehearing on this matter.

[8] The effect of this treatment of the ROE collar calculation is symmetrical. The People note that in a year where the rate base is declining, the use of average rate base will benefit the Company by incorporating a higher rate base into the ROE calculation, compared to using year-end rate base.

IV. Conclusion

WHEREFORE, the People of the State of Illinois request that the Commission revisit the issues discussed above, grant rehearing, and modify its Interim Order of November 26, 2013 in accordance with the arguments presented above.

Respectfully submitted,

The People of the State of Illinois
by LISA MADIGAN, Attorney General

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